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No. 01-1846

In the Supreme Court of the United States

LEGAL ENVIRONMENTAL ASSISTANCE FOUNDATION, INC., PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
THOMAS L. SANSONETTI
Assistant Attorney General
D. JUDITH KEITH
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

16pp

QUESTION PRESENTED

Whether the court of appeals erred in concluding that the Environmental Protection Agency properly approved the State of Alabama's revised underground injection control program as satisfying the minimum statutory requirements for such state programs under Section 1421(b)(1) of the Safe Drinking Water Act, 42 U.S.C. 300h(b)(1).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 276 F.3d 1253.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2001. A petition for rehearing was denied on March 18, 2002 (Pet. App. 24a-25a). The petition for writ of certiorari was filed on June 12, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Pursuant to the Safe Drinking Water Act (SDWA), 42 U.S.C. 300f *et seq.*, the State of Alabama submitted to the Environmental Protection Agency (EPA) a revised program to protect underground sources of drinking water (USDW) from contamination from the underground injection of fluids used to enhance the recovery of natural gas from coal formations. Petitioner objected to EPA's proposed approval of the program. EPA rejected petitioner's objections and promulgated a final rule approving Alabama's revised program. The court of appeals denied petitioner's petition for review in part, granted it in part, and remanded. Pet. App. 2a, 9a-22a.

1. The purpose of the SDWA is to ensure "that water supply systems serving the public meet minimum national standards for protection of public health." H.R. Rep. No. 1185, 93d Cong., 2d Sess. 1 (1974). Part C of the SDWA, 42 U.S.C. 300h to 300h-8, is designed to protect underground sources of drinking water from contamination caused by underground injection of fluids. To achieve that goal, the SDWA establishes a partnership between the federal government and the States. Under this framework, EPA may delegate primary enforcement responsibility for protecting USDW from endangerment that could result from the improper injection of fluids to States that have established an effective underground injection control (UIC) program. States are required to submit to EPA a proposed UIC program that meets minimum statutory requirements. See 42 U.S.C. 300h(b)(1), 300h-1(b)(1)(A)(i); 40 C.F.R. 145.11(b). Upon EPA approval of a State's program, the State assumes primary enforcement and regulatory responsibility for underground injection activities

within its boundaries, and retains that responsibility until EPA determines by rule that the state program no longer meets SDWA minimum requirements. See 42 U.S.C. 300h-1(b)(3).

The SDWA provides two sets of criteria for approval of a State's UIC program. In general, state programs may be approved under the criteria set forth in SDWA Section 1422(b), 42 U.S.C. 300h-1(b). Approval under Section 1422(b) requires a State to show that its UIC program satisfies federal regulations promulgated by EPA under 42 U.S.C. 300h and set forth in 40 C.F.R. Part 145. However, for the portion of a UIC program that relates to certain methods of enhanced oil and natural gas recovery, a State may elect to seek EPA approval under SDWA Section 1425(a), 42 U.S.C. 300h-4(a). Approval under Section 1425 requires a State to demonstrate that its UIC program meets the requirements of SDWA Section 1421(b)(1) (42 U.S.C. 300h(b)(1))[1] and represents an effective program to pre-

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[1] Section 1421(b)(1) provides that, to be approved by EPA, a state program:

> (A) shall prohibit * * * any underground injection in such State which is not authorized by a permit issued by the State (except that the regulations may permit a State to authorize underground injection by rule);
>
> (B) shall require (i) * * * that the applicant for the permit to inject must satisfy the State that the underground injection will not endanger drinking water sources; and (ii) * * * that no rule may be promulgated which authorizes any underground injection which endangers drinking water sources;
>
> (C) shall include inspection, monitoring, recordkeeping, and reporting requirements; and

vent underground injection that endangers drinking water sources. Under the SDWA, endangerment of drinking water sources occurs if underground injection may result in the presence of any contaminant in underground water that supplies or can reasonably be expected to supply any public water system, and the presence of such contaminant either (1) "may result in such system's not complying with any national primary drinking water regulation"[2] or (2) "may otherwise adversely affect the health of persons.". 42 U.S.C. 300h (d)(2); see 40 C.F.R. 144.12(a). This test is referred to as the "endangerment" standard.

2. EPA regulations divide underground injection wells into five classes, of which Class II generally includes wells that inject fluids in connection with oil and gas recovery, production, and storage. Pet. App. 3a n.1, 15a-16a. EPA first approved Alabama's UIC program for Class II underground injection wells in 1982. *Id.* at 3a. That UIC program did not regulate wells that injected hydraulic fracturing[3] fluids to enhance re-

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> (D) shall apply (i) * * * to underground injections by Federal agencies, and (ii) to underground injections by any other person whether or not occurring on property owned or leased by the United States.

42 U.S.C. 300h(b)(1).

[2] National primary drinking water regulations specify the maximum contaminant levels for any contaminant "in water which is delivered to any user of a public water system." 42 U.S.C. 300f(1) and (3). They also establish monitoring and analytical requirements, reporting and recordkeeping requirements, and a variety of other requirements. See 40 C.F.R. Pt. 141.

[3] Hydraulic fracturing is a procedure in which fluids are injected into underground coal beds to create fractures to enhance the recovery of methane gas. The "injection of fracture fluids * * * is often a one-time exercise of extremely limited duration"

covery of methane gas from coal beds. *Ibid.* In 1994, petitioner requested that EPA withdraw approval of the Alabama UIC program, alleging that the program was deficient because it did not regulate such wells. *Id.* at 3a-4a. EPA denied that petition, concluding that because the wells were used principally for the production of methane gas rather than the injection of fracturing fluids, they did not fall within the regulatory definition of "underground injection." *Id.* at 4a. The court of appeals granted petitioner's petition for review, determined that hydraulic fracturing constitutes underground injection under Part C of the SDWA, and held that EPA's contrary interpretation was inconsistent with the plain language of the Act. *Ibid.*; see *Legal Envtl. Assistance Found., Inc.* v. *EPA*, 118 F.3d 1467, 1472, 1478 (11th Cir. 1997).

Petitioner then sought, and the court of appeals issued, a writ of mandamus to enforce the court's mandate. See *In re Legal Envtl. Assistance Found., Inc.*, No. 98-06929 (11th Cir. Feb. 18, 1999) (unpublished). In accordance with the writ of mandamus, EPA initiated proceedings to withdraw its approval of Alabama's program. Pet. App. 4a.

3. Before the withdrawal process was complete, on August 20, 1999, Alabama adopted a rule to regulate hydraulic fracturing of coal beds as part of its Class II UIC program revision package, and submitted the revised program to EPA under SDWA Section 1425(a). Pet. App. 4a-5a. Alabama's rule established standards and procedures to protect against adverse effects of

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and "fracture injections generally last no more than two hours." See *State of Alabama; Underground Injection Control (UIC) Program Revision; Approval of Alabama's Class II UIC Program Revision*, 65 Fed. Reg. 2892 (2000) (EPA final rule).

hydraulic fracturing of coal beds. See Ala. Admin. Code r. 400-3-8-.03 (2002) (*reprinted in* State Oil and Gas Bd. of Ala. Br. in Opp. 10-16).[4] The rule prohibits hydraulic fracturing "in a manner that allows the movement of fluid containing any contaminant into a USDW, if the presence of that contaminant may: (a) cause a violation of any applicable primary drinking water regulation under 40 C.F.R. § 141; or (b) otherwise adversely affect the health of persons." *Id.* r. 400-3-8-.03(2). The rule requires prior written approval before hydraulic fracturing of coal beds (*id.* r. 400-3-8-.03(5)) and imposes recordkeeping requirements on well operators permitted to engage in fracturing. *Id.* r. 400-3-8-.03(7). In order to obtain state approval, a well operator must certify in writing, with supporting evidence, that the proposed fracturing operation will not occur in a USDW, or that the mixture of fluids to be used for fracturing does not exceed the levels specified for drinking water at 40 C.F.R. Part 141 subparts B and G (Ala. Admin. Code r. 400-3-8-.03(3) (2002)); the operator must submit any additional evidence required by the State "in order for the [State] to determine if the

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[4] The provision was originally codified as Rule 400-4-5-.04 (Ala. Admin. Code), and was renumbered after EPA's approval of the program. On September 4, 2001, a new subsection 4 was added to the rule to require operators to submit a fee along with applications to engage in hydraulic fracturing. See *id.* r. 400-3-8-.03(4). Apart from that amendment and conforming renumbering of prior subsections 4 and 5, none of which changes are at issue here, the two versions of the rule are identical. Because pre-existing subsections 6 and 7 were not renumbered at the time of the amendment, the rule now contains two subsections 6. To prevent confusion, references in this brief to subsection 6 will be accompanied by a citation to the page in the State Oil and Gas Board's brief in opposition at which the relevant provision is reprinted.

proposed fracturing operation could endanger any USDW." *Id.* r. 400-3-8-.03(7). The rule imposes progressively stricter standards on wells nearer to the surface, and prohibits fracturing outright at depths of less than 300 feet. *Id.* r. 400-3-8-.03(6)(d); State Oil and Gas Bd. of Ala. Br. in Opp. 15. The rule sets mandatory standards for the construction of coalbed methane gas wells (Ala. Admin. Code r. 400-3-8-.03(6)(a)(2) (2002); State Oil and Gas Bd. of Ala. Br. in Opp. 11-12), and requires that "a fracturing proposal will be denied" unless a mandatory evaluation of strata overlying the uppermost coal bed to be fractured demonstrates that "[i]mpervious strata * * * overlie the uppermost coal bed and [are] of sufficient thickness and consistency to serve as a barrier to the upward movement of fluids." Ala. Admin. Code r. 400-3-8-.03(6)(a)(5) (2002); State Oil and Gas Bd. of Ala. Br. in Opp. 12.

4. In light of the State's revised submission, EPA terminated the withdrawal proceedings. Pet. App. 4a-5a; see *State of Alabama; Underground Injection Control (UIC) Program Revision; Approval of Alabama's Class II UIC Program Revision*, 65 Fed. Reg. 2890 (2000) (EPA final rule). EPA conducted a public hearing and received written comment on its proposed approval of Alabama's revised program. Pet. App. 5a. Petitioner objected, arguing among other things that the rule did not satisfy the standards of Section 1421(b)(1) because it did not prohibit injection of potentially harmful substances that were not subject to national primary drinking water regulations. EPA rejected petitioner's objections, and on January 19, 2000, EPA promulgated a final rule approving Alabama's revised program under SDWA Section 1425(a). See 65 Fed. Reg. at 2889. EPA concluded that "the Alabama program revision includes regulations that are

more stringent than existing Federal regulations for hydraulic fracturing and meets the standards of Section 1425" (*id.* at 2893), and creates "an effective program to prevent underground injection which endangers drinking water sources." *Id.* at 2895.

5. Pursuant to the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, petitioner filed a petition for review of EPA's approval of Alabama's revised program in the court of appeals. See also 42 U.S.C. 300j-7(a)(2). The court of appeals denied the petition in part, granted it in part, and remanded. Pet. App. 1a-23a. The court first rejected petitioner's claim that the State's program for underground injection of hydraulic fracturing fluids could be approved only under Section 1422 of the SDWA and not under Section 1425. The court had "little trouble concluding that EPA's decision to subject hydraulic fracturing to approval under § 1425 rests upon a permissible construction of the [SDWA]." *Id.* at 12a. Second, the court agreed with petitioner's claim that EPA had erred by classifying hydraulic fracturing of coal beds as a "Class II-like underground injection activity" rather than under one of the five classifications of wells explicitly provided by regulation, concluding that that classification was "inconsistent with the plain language of 40 C.F.R. § 144.6." *Id.* at 21a. The court remanded to EPA "to determine whether Alabama's revised UIC program complies with the requirements for Class II wells." *Ibid.*

Finally, the court rejected petitioner's claim that EPA had acted arbitrarily and capriciously by concluding that the Alabama program met the statutory criteria of Section 1421. Pet. App. 22a-23a. Petitioner had argued in part that Alabama's revised UIC program failed to require that a permit applicant satisfy the State that underground injection would not en-

danger underground sources of drinking water, as required by Section 1421(b)(1)(B). *Id.* at 23a n.13. After "carefully consider[ing]" that argument, *ibid.*, the court concluded that petitioner had not met the "heavy burden" of showing that EPA had acted arbitrarily. *Id.* at 22a. The court emphasized that a reviewing court "may not substitute [its] judgment for that of the agency and can set aside an agency's decision only if the agency relied on improper factors, failed to consider important relevant factors, or committed a clear error of judgment that lacks a rational connection between the facts found and the choice made." *Ibid.*

ARGUMENT

The court of appeals correctly concluded that EPA acted reasonably and properly in approving Alabama's UIC program. Petitioner does not contend that that decision conflicts with any decision of this Court or of any other court of appeals, but simply claims that the court misapplied settled law to the facts of this case. That factbound claim lacks merit, and because the court of appeals remanded for further proceedings before EPA, the case is in an interlocutory posture. Further review is not warranted.

1. Petitioner renews its contention (Pet. 9-17) that EPA acted arbitrarily in approving the Alabama UIC program, claiming that the program does not fulfill Section 1421's requirement that a permit applicant must satisfy the State that the underground injection will not endanger drinking water sources. See 42 U.S.C. 300h(b)(1)(B). Although conceding that the Alabama program requires a permit applicant to demonstrate that a fracturing program will not cause an underground drinking water source to exceed national primary drinking water standards (Pet. 14), it contends

that the program does not ensure such operations will satisfy the additional requirement that contaminants will not "otherwise adversely affect the health of persons." Pet. 15 (quoting 42 U.S.C. 300h(d)(2)). Thus, petitioner claims, EPA "fail[ed] to consider a relevant factor" (Pet. 14), and improperly concluded that the Alabama program is an effective program to prevent endangerment of drinking water sources as required by Section 1425(a). That argument is without merit.

Part C of the Safe Drinking Water Act provides that state underground injection control programs must require that "the applicant for [a] permit to inject must satisfy the State that the underground injection will not endanger drinking water sources." 42 U.S.C. 300h (b)(1)(B). Far from "*entirely fail[ing]* to consider" that requirement (*Arkansas* v. *Oklahoma*, 503 U.S. 91, 113 (1992) (emphasis added) (quoting *Motor Vehicle Mfrs. Ass'n of the United States, Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)), EPA specifically addressed it and found that it had been satisfied by the State's program. EPA specifically noted that the Alabama program provides that "[c]oal beds *shall not be hydraulically fractured* in a manner that allows the movement of fluid containing *any contaminant* into a USDW" not only if the presence of the contaminant would violate applicable primary drinking water regulations, but also if it would "*otherwise adversely affect the health of persons.*" 65 Fed. Reg. at 2894 (emphasis added) (quoting Ala. Admin. Code r. 400-4-5-.04(2) (2002) (now *id.* r. 400-3-8-.03(2))); *id.* at 2892; see Ala. Admin. Code r. 400-3-8-.03(1) (2002) ("If hydraulic fracturing operations * * * endanger any USDW, then such well *shall* be properly plugged and abandoned.") (emphasis added). The Alabama program ensures that fracturing operations will comply with that require-

ment because, as EPA noted, "hydraulic fracturing *may not occur*" without "the [State's] written approval signifying that those conditions [set forth in the Rule] are met." 65 Fed. Reg. at 2894 (emphasis added).[5]

Because the Alabama program requires that both of the requirements of the SDWA's "endangerment" standard be satisfied before a fracturing program can be authorized, see 42 U.S.C. 300h(d)(2), the court of appeals properly concluded that EPA did not act arbitrarily when it determined that the Alabama program satisfies the requirements of Section 1421(b)(1) and "represent[s] an effective program that prevents underground injection which endangers drinking water sources." 65 Fed. Reg. at 2894. See generally *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974) ("Under the 'arbitrary and capricious' standard the scope of review is a narrow one."); cf. *United States Postal Serv.* v. *Gregory*, 122 S. Ct. 431, 434 (2001) ("the arbitrary and capricious standard is extremely narrow"). There is no reason for this Court to revisit that factbound determination.

2. In addition, review at this time is not appropriate because of the interlocutory posture of the case. The court of appeals "remand[ed] to EPA to determine whether Alabama's revised UIC program complies with the requirements for Class II wells" under 40 C.F.R. Parts 144 and 146. Pet. App. 21a. A fuller administrative record therefore will be developed, which will

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[5] Petitioner therefore errs in its repeated suggestion (Pet. 8, 12-13, 14-15, 15 n.10, 16) that the Alabama program allows for underground injection that would adversely affect the health of persons because some constituents of the injectate are not among the extensive list of substances that are the subject of primary drinking water standards. See 40 C.F.R. Pt. 141.

be subject to further review by the court of appeals. It is possible—although we believe unlikely—that those further proceedings would result in all the relief petitioner seeks. Review by this Court would therefore be premature. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
THOMAS L. SANSONETTI
Assistant Attorney General
D. JUDITH KEITH
Attorney

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